314 U.S. 649

No. 735

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1941

THE AMERICAN PACKING AND PROVISION COMPANY, *a corporation,*

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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The American Packing and Provision Company prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered on August 20, 1941, (R. 34-41) reversing a judgment of the District Court for the District of Utah granting the petitioner judgment against the United States in the sum of $3,708.41.

OPINIONS BELOW

The District Court entered no opinion. The opinion of the Circuit Court of Appeals (R. 34-41) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

On various dates subsequent to the enactment of the Agricultural Adjustment Act, subsequently held unconstitutional by this Court, which act purported to impose a tax upon the processing of hogs, and prior to the date that the said Act was declared to be unconstitutional by this Court in its decision in the case of *United States v. Butler,* 297 U. S. 1, the petitioner entered into certain contracts with the United States Government under which it agreed to furnish to various agencies of the Government certain supplies, including pork and pork products, at prices fixed by bids submitted by petitioner and accepted by the Government. With two exceptions, each of the contracts stipulated in substance that the bid prices named therein "included" any federal tax theretofore imposed by the Congress which was applicable to the materials covered by the bids. The Government paid to petitioner the full contract prices for the materials furnished to the Government under the contracts. Petitioner, who had, prior to the making of the said bids and prior to the execution of the said contracts, enjoined the Government from the collection of the so-called processing taxes, did not pay to the Government the amount of so-called processing taxes purported to have imposed upon the processing of the materials covered by the said contracts.

Two questions are presented:

First: Were processing taxes, as a matter of fact, included in the contract prices of the eighteen contracts?

Second: If such processing taxes were, in fact, so included in such contract prices, is the Government entitled to a corresponding adjustment in such prices in view of the fact that petitioner did not pay such so-called taxes to the Government?

STATUTES INVOLVED

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20, 24:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (U.S.C., Title 31, Sec. 71.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, 35, as amended:

PROCESSING TAX

> "SEC. 9 (a). To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under Section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * * The processing tax shall be levied, assessed and collected upon the first domestic processing

of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under Section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * *"

(U. S. C. Supp. V, Title 7, Sec. 609.)

SEC. 10 * * *

MISCELLANEOUS

"(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein."
(U. S. C. Supp. V. Title 7, Sec. 610.)

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, sugar beets and sugar cane, peanuts, and milk and its products, and any regional or market classification, type, or grade thereof; * * *"
(U. S. C. Supp. V, Title 7, Sec. 611.)

STATEMENT

Petitioner is a first domestic processor of meat products at Ogden, Utah. On September 13, 1939, petitioner, as the success-

ful bidder, entered into a contract with the United States Government to furnish certain of its products to governmental agencies. The contract was fulfilled and the purchase price in the sum of $3,708.41 submitted for payment. (R. 23-24.) The Government, through the General Accounting Office, deducted from the contract purchase price, the sum of $2,931.14, which it claimed had been paid to petitioner as processing taxes imposed by the Agricultural Adjustment Act on products covered by eighteen contracts previously awarded petitioner, and which taxes petitioner had not paid. (R. 24.) Prior to the taking of the bids or letting such eighteen prior contracts, namely, on March 31, 1935, petitioner enjoined the collection of the tax, and thereafter did not pay to the Government any processing taxes purported to have been imposed under the supposed authority of the Agricultural Adjustment Act. (R. 30.) With two exceptions, namely, contracts identified in the record as 10 and 11, each of the eighteen contracts stipulated in substance that the bid prices named therein "included" any federal tax theretofore imposed by the Congress which was applicable to the material covered by the bids. (R. 27-29.) The amounts of so-called processing taxes imposed pursuant to the supposed authority of the Agricultural Adjustment Act upon pork and pork products covered by the said eighteen contracts were as follows:

Contract 1	$969.57
Contract 2	699.06
Contract 3	731.96
Contract 4	75.18
Contract 5	97.33
Contract 6	72.26
Contract 7	9.49
Contract 8	9.25
Contract 9	48.44
Contract 10	8.56
Contract 11	30.87
Contract 12	5.00

Contract 13	73.45
Contract 14	15.36
Contract 15	40.47
Contract 16	31.80
Contract 17	9.49
Contract 18	3.60

in the total sum of $2,931.14. (R. 27.)

Each of the said eighteen contracts were let as a result of competitive bids taken by the Government, and the contract price in each case was fixed and determined by such competitive bids. (R. 30.) Each contract price was a unit price for the supplies bought thereunder, and the Government contracted to pay and paid but the single unit price named in each contract. (R. 30.) Following the deduction of the sum of $2,931.14 by the General Accounting Office from the amount of $3,702.41 due petitioner under the contract of September 13, 1939, the Government tendered petitioner the sum of $771.27, being the difference between the two, which amount petitioner refused to accept. (R. 25.) Petitioner thereupon brought its action in the District Court for the District of Utah against the Government for the sum of $3,702.41, being the full amount of the September 13, 1939, contract price. (R. 4-9.) The Government answered claiming a deduction in the sum of $2,931.14 as a set off, claiming that it had overpaid petitioner in that amount on the eighteen prior contracts. (R. 9-15.) The District Court gave petitioner judgment for the full amount of the contract price. (R. 31-34.) On appeal, the United States Circuit Court of Appeals for the Tenth Circuit, reversed the judgment of the District Court with directions to the District Court to enter judgment in petitioner's favor for but the sum of $771.27. (R. 41.)

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court for the Tenth Circuit erred:

1. In holding that processing taxes were included in the contract prices of the eighteen contracts.

2. In holding that the Government was entitled to adjustment of the contract prices of the eighteen contracts.

3. In holding that petitioner was not entitled to recover judgment of the Government in the full amount of the September 13, 1939, contract price in the sum of $3,708.41.

4. In holding that petitioner was entitled to judgment against the Government for but the sum of $771.27.

REASONS FOR GRANTING WRIT

I.

THE DECISION HEREIN OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE SAME MATTER, AND IS CLEARLY ERRONEOUS

In the instant case, the Circuit Court of Appeals for the Tenth Circuit held in favor of the Government and against Petitioner, summarizing its views in the matter as follows:

> "We hold that under the facts here, the Government put the vendor in funds for the payment of a tax, exclusive of the purchase price, calculated by the vendor and which the vendor did not pay, as contemplated by the parties. As a consequence, the vendor received a benefit from the Government, which in justice and good conscience should be returned. The Government having pleaded the same as an equitable setoff, it is entitled to recover against the contract sued upon." (R. 40.)

This holding is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit rendered by it on November 30, 1940, in the case of *United States v. Hagan & Cushing Co.*, 115 F. 2nd 849 on the same matter, and in which case relief was denied the Government. The Circuit Court of

Appeals for the Tenth Circuit in its decision in the instant case recognized its conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the Hagan & Cushing Co. case in the folowing language:

> "We are aware that the conclusion reached here is not in conformity with the majority view in United States v. Hagan & Cushing Co., 115 F. 2d 849, which denied relief to the Government because in the majority's view, the Government did not invoke an equitable remedy as a defense to a contract containing similar terms and provisions." (R. 40.)

The decision of the Circuit Court of Appeals in the present case is based on two falacies and is clearly erroneous. In the first place, the Court below assumed that the parties labored under a mutual mistake as to the validity of the processing tax, and that the payment of the tax by petitioner was "contemplated by the parties." There is absolutely no basis in the record for such an assumption. On the contrary, the possibility of judicial determination of invalidity was clearly in the minds of the parties, since it appears that the petitioner had an injunction against the collection of the processing tax before the contracts were signed. (R. 30.)[1] At most, there was a recognized doubt as to the validity of the taxes, but that would not constitute a mistake justifying equitable relief.

> Williston, Contracts (Rev. Ed.) sec. 1543.
> Pomeroy, Equity Jurisprudence (4th ed.) sec. 855.
> American Law Inst. Restatement: Contracts sec. 502, comment f; Restitution sec. 10(1), comment a, and sec. 11(1).

1-As a matter of fact, the Comptroller General, prior to the decision in Butler v. U. S., 297 U. S. 1, had occasion to consider tax clauses in Government contracts similar to those involved here. Not only did he recognize the possibility of a judicial determination of invalidity, but he actually ruled that the clauses would not require any price adjustment in the event of a decision of invalidity. A-64860, 15 Dec. Compt. Gen. 201; A-66872, 15 Dec. Compt. Gen. 368.

In the second place, the Court below confuses the contract recital that the stated prices "included" certain taxes with the idea that the burden of such taxes was shifted, in the sense that the contract prices were higher because of the taxes than they would have been in the absence of the taxes. Even if there had been a sufficient mistake, which we deny, the Government's recovery on equitable grounds could not exceed the portion of the processing tax burden actually shifted to it. There is no basis for an "assumption *a priori* that any particular tax at any particular time is passed on."[2] As a matter of fact, the published findings of the Bureau of Agricultural Economics are to the effect that the processing tax on hogs had no appreciable effect on the market prices of hog products.[3]

The Court below said that the recitals in the contracts were prima facie evidence that the price "did include the applicable processing taxes," but the Court did not indicate that it grasped the concept of shifting the economic burden of the tax. The expression "price includes tax" is ambiguous, and the District Court, which found for petitioner on the facts, may well have taken the view that the clause had no reference to the economic effect of the tax on price, but meant simply that there was to be

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2-Stone, J., dissenting in Indian Motorcycle v. U. S. 283 U. S. 570, 581.

3-"An Analysis of the Effects of the Processing Taxes Levied under the Agricultural Adjustment Act," prepared by the Bureau of Agricultural Economics, and published by the Treasury Department (Gov't Printing Office, 1937), page 9:

> "Since the aggregate retail value of hog products consumed apparently was not changed by the tax, and the volume of hog products consumed was not materially affected, it follows that retail prices of hog products were little, if any, higher with the tax than they would have been without the tax. * * * In other words, if there had been no processing tax, the retail price of hog products would have been no different from what it actually was in both years when the tax was in effect."

no separate charge or addition to price on account of such taxes.[4]

There was certainly no basis for reversing the District Court on broad equitable grounds, without some real evidence to the effect that the full amount of the tax burden had been shifted to the Government in the contract prices.

It is submitted, therefore, that there was no mistake justifying equitable relief, and there was no showing as to the extent to which the burden of the processing taxes affected the prices paid by the Government. The decision allowing the set-off in the full amount of such taxes is clearly erroneous.

II.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURT OF CLAIMS ON THE SAME MATTER

The decision of the United States Circuit Court of Appeals for the Tenth Circuit is in conflict with the decisions of the United States Court of Claims in two cases recently decided by it on the same matter, namely, *Ismert-Hincke Milling Co. v. United States,* 90 Ct. Cls. 27, and *Kansas City Flour Mills Corporation v. United States,* .... Ct. Cls. ...., certiorari granted May 12, 1941, in which cases relief was denied the Government. The United States Circuit Court of Appeals for the Tenth Circuit recognized the conflict between its decision and the decision of the Court of Claims in those two cases in the following language:

> "We are also aware that our reasoning and conclusion is inconsistent with the reasoning and conclusion in Ismert-Hincke Milling Co. v. United States, 90 C. Cls.

4-This is the most likely meaning, since under some circumstances processing taxes were billed separately and collected from vendees, under the authority of Sec. 18 of the Agricultural Adjustment Act. Moreover, the extent to which prices were effected by the tax at any time is obviously such a difficult and complex question of economic fact, that the parties would hardly have undertaken to express an opinion on the subject if they understood the nature of the problem. See Ferger, "Windfall Tax and Processing Tax Refund Provisions," 28 Am. Economic Rev. 45, 52; "An Analysis of the Effects of the Processing Taxes Levied under the Agricultural Adjustment Act," supra, p. 1.

> 27; and Kansas City Flour Mills Corporation v. United States, ... C. Cls. ...., certiorari granted May 12, 1941, which in our opinion did not recognize the distinction which we have pointed out between the general rule urged and the conclusion reached here." (R. 41.)

In the instant case it was held that under the facts the Government put the petitioner (vendor) in funds for the payment of a tax, exclusive of the purchase price. In the Ismert-Hincke Co. case and the Kansas City Flour Mills Corporation case, the Court of Claims, on the same facts, held that the Government did *not* put the vendor in funds for the payment of the tax. On that point, the Court of Claims in the Ismert-Hincke Co. case, held:

> "The question of law involved in the case has a number of times been before the court and the weight of authority is decidedly against the contention of the defendant.
>
> "In *Continental Baking Co. v. Suckow Milling Co.*, 101 Fed. (2d) 337, a leading case on the subject, it appeared that the plaintiff had entered into written contracts for the purchase of flour from the defendant. The plaintiff alleged that it had paid to the defendant $13,326.40 as the amount of processing taxes on the wheat that went into the flour purchased and that the item of tax was included in the price named in the contract in addition to the regular price of the flour. The defendant, however, resisted the payment of the tax and, it having been held invalid, did not pay it. Based on these facts, the plaintiff sued to recover the amount of the processing taxes which was included in the price paid for the flour. The defense was that the processing taxes did not appear as a separate item in the contracts which named only one price and by reason thereof, the tax was absorbed in the price paid for the flour. Attention is also called by the court to the fact that there was no provision for refund in event the processing tax should be annulled.
>
> "The opinion of the court in the case above cited considered a large number of cases involving the question

of the right of the purchaser to recover the amount of the tax under circumstances similar, or nearly similar, and held in effect that there could be no recovery where the tax was absorbed in the price and was not a separate item thereof.

"Among other cases, the court cited that of *Johnson v. Igleheart Bros., Inc.*, 95 Fed. (2d) 4, where the purchaser, as in the case now before us, contended there was an implied promise arising from the contract to refund the taxes which had been included in the purchase price and not paid. Further on in the opinion, a large number of cases are cited where relief had been denied on the ground that the tax item was absorbed in a composite price paid by the purchaser. The basis of these decisions was said to be 'the theory that where the tax has been absorbed in the price, the purchaser does not pay the tax but merely the price demanded for the goods, and that his rights being based solely on the contract, are controlled by the law of contracts.' The court further stated in effect that the cases cited show tax absorption when 'there is only one price shown on the contract (and) there is no separate invoicing of the tax.' Accordingly, the Circuit Court of Appeals in the Continental Baking Co. case, supra, dismissed the action of the plaintiff, stating, among other things, as a reason for its decision, that—

> 'The contract does not contain any provision for the refund of any part of the purchase price in the event the processing tax should be annulled.'

and that

> 'plaintiff did not pay two separate funds to the defendant, namely, a fund for the flour and fund for the tax, but on the contrary, * * * there was but one price named in each of the contracts.'

"It will be observed that the same condition existed in the case at bar."

III.

THE DECISION HEREIN OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES CIRCUIT COURTS OF APPEAL

The decisions heretofore considered which conflict with the decision herein have arisen out of cases identical with the instant one. In several other cases, however, involving the same matter, various United States Circuit Courts have rendered decisions in direct conflict with the decision of the United States Circuit Court for the Tenth Circuit herein. The only difference between the instant case, and those now to be referred to, lies in the fact that in the instant case one party to the contract was the United States, while in these other cases, both parties were individuals, and this circumstance, as heretofore pointed out, was held to be immaterial by the Ninth Circuit Court in the Hagan & Cushing Co. case, and by the Court of Claims in the Ismert-Hincke Co. case and the Kansas City Flour Mills case, supra.

In *Continental Baking Co. v. Suckow Milling Co.*, 7 Cir., 101 F. 2d 337, relief was denied the vendee on facts similar to those in the instant case.

Relief was likewise denied the vendee on similar facts in the following cases:

Moundridge Milling Co. v. Cream of Wheat Corporation, 10 Cir., 105 F. 2d 366;

Johnson v. Igleheart Bros., 7 Cir., 95 F. 2d 4, certiorari denied 304. U. S. 585;

Casey Jones v. Texas Textile Mills, Inc., 5 Cir., 87 F. 2d. 454;

Golding Bros. Co. v. Dumaine, 1 Cir., 93 F. 2d 162;

In the instant case the Court held (R. 40) that the vendee (Government) put the vendor (petitioner) in funds for the payment of the tax exclusive of the purchase price of the materials. On the contrary, however, each of the foregoing cases (except the Moundridge Milling Co. case, which was decided on another point and to which further reference will be made) held that under facts similar to those in the instant case there was no payment of separate funds, namely, a fund for the tax and a fund for the merchandise, but, on the contrary, there was paid but a single composite price and the vendee was not entitled to a refund of any portion thereof.

The United States Circuit Court for the Tenth Circuit agreed with the foregoing cases and concedes, as held therein:

> "* * * that a refund of an unconstitutional or invalid tax will be denied if the tax, refund of which is sought is 'buried' or 'absorbed' in the composite bid price; is not ascertainable or the buyer fails to show that it bore the burden of its payment." (R. 37.)

But the decision in the instant case conflicts with those decisions in that it grants the vendee relief and holds:

> "They (the taxes) were not 'buried' or 'absorbed' in the sense that the burden of their payment could not be fixed with sufficient definiteness." (R. 39.)

and,

> "We hold that under the facts here, the Government put the vendor in funds for the payment of a tax, exclusive of the purchase price, * * *." (R. 40.)

It is in this respect that the conflict arises, because the cases above referred to hold under similar facts and circumstances that the tax *was* buried or absorbed in the composite bid price, and the cases accordingly, deny relief to the vendee.

To demonstrate, the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Continental Baking Co. v. Suckow Milling Co., supra,* held on substantially similar facts:

> "The contract and the exhibit reveal that plaintiff did not pay two separate funds to the defendant, namely, a fund for the flour and a fund for the tax, but, on the contrary, alleged that there was but one price named in each of the contracts. In other words, this is a case where only one price, the price paid for the flour was stated. As expressed in the language of Mr. Justice Holmes, speaking for the whole court, 'The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else.' *Lash's Products Co. v.* U. S., 278 U. S. 175, 176, 49 S. Ct. 100, 73 L. Ed. 251."

And again, the same court on substantially similar facts in the case of *Johnson v. Igleheart Bros., supra*:

> "In the instant case, the amount of the alleged tax was included and absorbed in the price named in the contract and paid by the buyer, and we think it was a price to be paid at all events."

IV.

THE DECISION HEREIN OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IS IN CONFLICT WITH A PREVIOUS DECISION OF THE SAME COURT ON THE SAME MATTER, WHICH PREVIOUS DECISION THE COURT IN THE INSTANT CASE DOES NOT PURPORT TO OVERRULE, BUT, ON THE CONTRARY, EXPRESSLY APPROVES

The decision in the instant case likewise conflicts with a previous decision of the same Circuit Court, which previous decision the Court does not in this case purport to overrule, but, on the contrary, expressly refers to with approval, and the result is hopeless conflict even within the boundaries of the Tenth Circuit as to what the law is in the matter. In the instant case, the

decision of the Circuit Court is predicated upon the premise that the contract prices in fact included processing taxes. In its decision, with reference to the tax clauses, it says:

> "They (the tax clauses) are prima facie evidence that the purchase price, fixed by the contract, did include applicable processing taxes." (R. 39.)

and again:

> "We hold that under the facts here, the Government put the vendor in funds for the payment of a tax * * *." (R. 40.)

But this same Court has also held, under facts similar to the ones in the instant case, not only that processing taxes were not included in contract prices, but that it was an impossibility so to include them. This was in the case of *Moundridge Milling Company v. Cream of Wheat Corp., supra.* In that case, the tax clause was even stronger for the vendee than in the instant case, in that it specifically referred to processing taxes. There the parties, by their contract, agreed:

> "Taxes: The prices named in this contract include the processing taxes as now imposed by the United States on the processing of the commodities used in the manufacture of the products covered by this contract, * * *."[5]

It is obvious that for the decision in the Moundridge case to be in conformity with the decision in the instant case, the court should have held that the contract price included the processing taxes. On the contrary, however, the Court held in the following language that the processing taxes ***were not, and could not have been,*** included in the contract price:

> "The tax was illegal in that the act under which it was sought to be imposed was unconstitutional. The act being void, in legal contemplation there never was any tax."

5-The tax clause there involved is set out in full in Footnote 6 to the decision, as reported in 105 F. 2d 367.

Or, to state the proposition in the reverse, in order for the decision of the Circuit Court in the instant case to conform with its previously enunciated statement of the law in the Moundridge case, the Court should have held that as the processing taxes, which the Government claims were included in the contract prices, were imposed pursuant to an unconstitutional and void law, in legal contemplation they never existed, and accordingly, could not have been included in bid prices. But the Circuit Court in the instant case, instead of applying the statement of the law enunciated by it in the Moundridge case, and in the very teeth thereof, held that processing taxes were included in contract prices and the tax clauses were evidence of such inclusion. And this without overruling the Moundridge case, or without any reference to it or the statements of law therein contained, except by refering to the case with approval as being in conformity with the general law. (R. 37.)

V.

THIS COURT HAS HERETOFORE GRANTED THE GOVERNMENT CERTIORARI IN ANOTHER CASE DECIDED ADVERSELY TO THE GOVERNMENT BUT WHICH INVOLVED THE SAME MATTER, AND PETITIONER IS THEREFORE ENTITLED TO HAVE THE WRIT GRANTED IN THIS CASE WHICH WAS DECIDED FAVORABLY TO THE GOVERNMENT BUT ADVERSELY TO PETITIONER

As heretofore pointed out, the Court of Claims has recently decided two cases involving the same matter adversely to the Government and contrary to the decision of the Tenth Circuit Court herein. These two cases are *Ismert-Hincke Milling Co. v. United States, supra,* and *Kansas City Flour Mills Corporation v. United States, supra.* The Government did not seek a review by this Court of the first of these two decisions, namely, that in the Ismert-Hincke Milling Co. case, but did seek a review in the Kansas City Flour Mills Corporation case, and this Court on May 12, 1941, granted certiorari for the purpose of reviewing that decision. In view of the fact that the same matter here

involved is to be decided by this court in the Kansas City Flour Mills Corporation case, petitioner respectfully represents that it is entitled to the writ prayed for herein, for the reason that if this petition for certiorari should be denied, the decision of the Tenth Circuit Court herein would become final, and yet this Court might thereafter hold contrary to the decision of the Tenth Circuit Court by affirming the Court of Claims in the Kansas City Flour Mills case, but petitioner in this case would then be without remedy to receive any advantage from this Court's decision in that case.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit Court should be granted.

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Ogden, Utah
NOVEMBER, 1941.

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE AMERICAN PACKING AND PROVISION COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The grant or denial of a writ of certiorari in this case should depend upon the decision of the Court in *United States* v. *Kansas Flour Mills Corp.*, No. 45, present term.

The issues involved in the instant case are in substance identical with those involved in the *Kansas Flour Mills Corp.* case, which the Government brought before this Court on a writ of certiorari to review the judgment of the Court of Claims of the United States. (See 92 C. Cls. 390.) The Court heard argument in the *Kansas Flour Mills Corp.* case on November 21, 1941.

For these reasons, we submit, action upon this petition should be postponed until the Court ren-

ders its decision in the *Kansas Flour Mills Corp.* case, and if the Government's position in that case is sustained, the petition should then be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DECEMBER, 1941.

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